



401 9<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20004

August 2, 2005

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
12th Street Lobby, TW-A325  
Washington, D.C. 20554

**Re:** *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands* – WT Docket No. 03-66;  
**WRITTEN EX PARTE PRESENTATION**

Dear Ms. Dortch:

The Clarendon Foundation and Sprint Corporation (collectively, "Sprint/Clarendon") are jointly submitting the attached *Consolidated Opposition to Supplement to Petition for Reconsideration and Petition for Extraordinary Relief* in response to the *Supplement*<sup>1</sup> and *Petition for Relief* filed by the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED").

Because IMWED cites no basis in the Federal Communications Commission's ("Commission") rules as authorizing its filings, Sprint/Clarendon has styled the attached response as an opposition pleading, submitted under Section 1.1206(b) of the Commission's *ex parte* rules. Pursuant to that section, this letter and enclosure are being electronically filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

/s/ David Munson

David Munson  
Attorney

Attachment

cc: See enclosed service list.

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<sup>1</sup> Supplement to Petition for Reconsideration of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66 (filed June 20, 2005) ("*Supplement*").

<sup>2</sup> Petition for Extraordinary Relief of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66 (filed July 14, 2005) ("*Petition for Relief*").

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other	)	
Advanced Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
	)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable Multipoint	)	MM Docket No. 97-217
Distribution Service and the Instructional Television	)	
Fixed Service to Engage in Fixed Two-Way	)	
Transmissions	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service	)	
for the Gulf of Mexico	)	
	)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of	)	
Secondary Markets	)	

**CONSOLIDATED OPPOSITION TO SUPPLEMENT TO  
PETITION FOR RECONSIDERATION AND PETITION  
FOR EXTRAORDINARY RELIEF**

**CLARENDON FOUNDATION**

Kemp R. Harshman  
President  
  
Clarendon Foundation  
4201 31st Street South  
Suite 826  
Arlington, VA 22206  
703-598-7265

August 2, 2005

**SPRINT CORPORATION**

Luisa L. Lancetti  
Vice President, Wireless Regulatory Affairs  
David Munson  
Attorney  
  
Sprint Corporation  
401 9<sup>th</sup> Street, N.W., Suite 400  
Washington, D.C. 20004  
202-585-1923

## TABLE OF CONTENTS

Summary.....	ii
I. INTRODUCTION.....	2
II. IMWED’S SUPPLEMENT FAILS TO SUPPORT THE RULE CHANGES IT ADVOCATES.....	4
III. IMWED’S PETITION FOR RELIEF IS PROCEDURALLY DEFICIENT AND WITHOUT MERIT.....	11
IV. CONCLUSION.....	14

## Summary

Clarendon and Sprint make the following points in this consolidated opposition:

1. IMWED's *Supplement* and *Petition for Relief* are without merit and procedurally deficient. Indeed, these submissions appear generated to advance IMWED's political agenda, by raising non-existent controversies concerning certain Clarendon Lease provisions.

2. IMWED's observations concerning Clarendon's retention of five percent of the capacity of its channels for educational use under the lease are irrelevant. The Commission has rejected IMWED's proposals to increase the educational usage requirements. Clarendon elected to lease to Sprint the maximum capacity of WAU27 permitted under Commission rules in recognition that it can meet its educational needs with the capacity it has retained, and that leasing the remainder to Sprint will maximize revenues to advance its educational objectives and will promote the Commission's efforts to maximize spectrum efficiency.

3. IMWED's observation concerning the inclusion of a purchase option in the Clarendon Lease also is irrelevant. The Commission does not prohibit purchase options in EBS leases. Moreover, such options can only be exercised if the Commission amends its rules in the future to change its EBS eligibility requirements; and even then, the Commission would have to rule on any license-specific assignment application.

4. IMWED's contentions that the Clarendon Lease term is indefinite and inconsistent with the Commission's EBS eligibility requirements are wrong. The Clarendon Lease construct tracks the Commission's *de facto* leasing rules regarding lease terms, and Clarendon retains *de jure* control over the lease spectrum, again as required by those rules. The Clarendon Lease is a prime example of how EBS entities support a panoply of education-related projects, and that such arrangements further Commission objectives.

5. IMWED's proposals to require public filing of unredacted leases would merely reinsert the inefficiencies, transaction costs and administrative burdens that the Commission's secondary markets leasing mechanics sought to eliminate. The Clarendon Lease complies with Commission rules and the Commission already has full ability to monitor and review leases through the secondary markets leasing provisions.

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**CONSOLIDATED OPPOSITION TO SUPPLEMENT TO  
PETITION FOR RECONSIDERATION AND PETITION  
FOR EXTRAORDINARY RELIEF**

The Clarendon Foundation ("Clarendon")<sup>1</sup> and Sprint Corporation ("Sprint")

(collectively, "Sprint/Clarendon") submit this consolidated opposition to the Supplement to

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<sup>1</sup> The Clarendon Foundation was organized on March 3, 1991, as a Virginia nonprofit corporation. Clarendon's principal mission is to provide instructional television programming and wireless broadband access to public and private schools and colleges as a licensee in the Educational Broadband Service. Clarendon has been granted licenses in 17 markets. Besides applying for EBS licenses itself, Clarendon has prepared EBS reference manuals for educators and assisted over 70 public and private schools and colleges in applying for EBS licenses. Clarendon has developed programming for The History Channel, provided funding for independent documentary development, and is involved with various education-related projects. For example, Clarendon currently is developing an Internet website about the United States Constitution, with educational content suitable for accredited institutions, and is laying the groundwork for the establishment of a television network for nonprofit organizations.

Petition for Reconsideration (“*Supplement*”)<sup>2</sup> and Petition for Extraordinary Relief (“*Petition for Relief*”)<sup>3</sup> submitted by the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (“IMWED”). Because IMWED cites no basis in the Federal Communications Commission’s (“FCC” or “Commission”) rules as authorizing its filings, Sprint/Clarendon has styled this response as an opposition pleading, submitted under Section 1.1206(b) of the Commission’s *ex parte* rules.<sup>4</sup> Clarendon (which IMWED did not serve with any copies of its filings) joins with Sprint in this response to oppose the various unsubstantiated allegations IMWED has made regarding Clarendon’s EBS lease for certain call-sign WAU27 spectrum with Sprint, and more generally to support the Commission’s current policies and decisions that maximize EBS leasing flexibility. IMWED’s *Supplement* and *Petition for Relief* are without merit and procedurally deficient and should be rejected.

## I. INTRODUCTION

The Commission has long permitted the leasing of Educational Broadband Service (“EBS”) spectrum by commercial entities. In the *BRS R&O*, the Commission essentially replaced the old EBS leasing regime with leasing rules and policies developed in its *Secondary*

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<sup>2</sup> Supplement to Petition for Reconsideration of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66 (filed June 20, 2005). The underlying petition to which the supplement refers was the Petition for Reconsideration of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66 (filed Jan. 10, 2005) (“*Reconsideration Petition*”).

<sup>3</sup> Petition for Extraordinary Relief of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66 (filed July 14, 2005).

<sup>4</sup> 47 C.F.R. § 1.1206(b).

*Markets R&O*,<sup>5</sup> which it adopted for the Broadband Radio Service (“BRS”) and EBS services.<sup>6</sup>

In adopting the secondary markets rules for BRS/EBS services, the Commission explained that its flexible secondary market policies lead to more efficient and dynamic use of spectrum resources, enhance numerous policy initiatives and public interest objectives, enable the development of innovative services in rural areas, and establish regulatory parity with other wireless services.<sup>7</sup> The Commission also rejected various lease-related restrictions that would have undermined its objectives – including lease term limitations and IMWED’s proposal to increase the minimum educational usage requirement – agreeing, instead, with commercial and educational commenters that “there is no reason to deprive licensees in the BRS/EBS spectrum of the benefits of [the secondary markets] rules and policies.”<sup>8</sup>

IMWED filed a petition for reconsideration of the *BRS R&O*, which seeks, among other things, to prohibit purchase options in EBS leases and to require the public filing of such leases.<sup>9</sup> Sprint and others opposed the leasing restrictions proposed by IMWED and others.<sup>10</sup> Now, more

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<sup>5</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003) (“*Secondary Markets R&O*”).

<sup>6</sup> *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) at ¶ 179 (“*BRS R&O*”).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See Reconsideration Petition* at 9-11.

<sup>10</sup> *See Consolidated Opposition to Petitions for Reconsideration of Sprint*, WT Docket No. 03-66 (filed on Feb. 22, 2005) at 3-7 (“*Sprint Opposition*”). *See, e.g., Consolidated Opposition to Petitions for Partial Reconsideration of the Wireless Communications Association International, Inc. (“WCA”)*, WT Docket No. 03-66 (filed Feb. 22, 2005) at 35-43 (“*WCA Petition*”). Sprint noted, for example, that IMWED’s proposals to prohibit purchase options in EBS spectrum leases and require public filing of leases are unnecessary, inefficient and inconsistent with Commission’s policy goals for the BRS/EBS service. *See Sprint Opposition* at 3-5.

than three months after the deadline for filing replies to oppositions to petitions for reconsideration of the *BRS R&O* has passed, IMWED has filed a *Supplement* and *Petition for Relief*, which as explained below, fail to provide substantive support for the relief that IMWED seeks.

## **II. IMWED'S SUPPLEMENT FAILS TO SUPPORT THE RULE CHANGES IT ADVOCATES**

The *Supplement* adds nothing to the record and evidences no activity that is in controversy. IMWED's *Supplement* references certain provisions in a long-term *de facto* transfer lease agreement (the "Clarendon Lease") between PCTV Gold, Inc., a wholly-owned subsidiary of Sprint, and Clarendon, which IMWED finds inconsistent with its policy objectives, *but which comply fully with the Commission's BRS/EBS rules*. IMWED takes issue with the Clarendon Lease terms covering educational use, a purchase option that, by its own terms, is ineffective unless the Commission's eligibility rules are amended.<sup>11</sup> The *Supplement* does not challenge the legality of the Clarendon Lease, nor could it.<sup>12</sup>

Whatever its purpose, IMWED's *Supplement* is irrelevant. IMWED observes that Clarendon's educational use of its capacity under the lease "will be the minimum allowed under current Commission Rules."<sup>13</sup> It is certainly true that Clarendon elected to lease to Sprint the maximum capacity of WAU27 spectrum permitted under Commission EBS spectrum usage requirements that have been in place since 1998 under the old BRS/EBS rules and have largely been retained in the new BRS/EBS rules. Clarendon did so in recognition that it can meet its

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<sup>11</sup> *Supplement* at 2-3.

<sup>12</sup> The *Petition for Relief* makes certain allegations regarding the legality of the Clarendon Lease which, as explained in section III of this response, are without merit and based upon misrepresentations concerning some of the lease's provisions.

<sup>13</sup> *Supplement* at 3.



educational needs with the capacity it has retained, and that leasing the remainder to Sprint will maximize the funding Clarendon receives to advance its educational objectives and will promote the Commission's efforts to maximize spectrum efficiency. The Commission already has determined that retaining its pre-existing minimum educational usage requirements furthers the public interest,<sup>14</sup> and the Clarendon Lease's compliance with those requirements has no bearing upon the sufficiency of that determination.

Moreover, IMWED's proposals to reduce the amount of spectrum that EBS entities can lease commercially are inconsistent with the Commission's goals of encouraging flexibility for the BRS/EBS services and harmful to the EBS community.<sup>15</sup> As a nonprofit organization, Clarendon relies upon revenues received from commercial operators pursuant to airtime lease agreements as a significant source for funding its educational activities and programs. The revenues derived from the Clarendon Lease, for example, allow Clarendon to provide a T-1 Internet connection from a local provider to a school in the Milwaukee area until the market is transitioned under the new BRS/EBS rules and Sprint wireless broadband access service is established in the area, at which time the site will receive wireless service and Clarendon will be able to rechannel funds it laid out for the T-1 connection to other education projects (which also serves as an example of commercial and EBS entities working together to make better use of the spectrum).

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<sup>14</sup> See *BRS R&O* at ¶¶ 152-164.

<sup>15</sup> See *Sprint Opposition* at 7-9. As Sprint further observed, such proposal would merely "reduce the amount of spectrum available for leasing by EBS licensees and thus impose opportunity costs in the form of lost lease revenues that might otherwise be used to achieve the licensees' overall educational missions more efficiently." *Id.* at 8.

IMWED also observes that there is a purchase option in the Clarendon Lease, but the purpose of that observation is a mystery.<sup>16</sup> The Commission has never prohibited purchase options in EBS leases that can only be exercised if the Commission amends its rules in the future to change its EBS eligibility requirements, and even then the Commission will have to rule on any license-specific assignment application. The fact that the Clarendon Lease includes a legally-compliant provision that IMWED does not like again seems irrelevant to the Commission's deliberations of IMWED's *Reconsideration Petition*.

In any event, IMWED's position on purchase options in EBS leases is inefficient and inconsistent with the Commission's leasing policies. As indicated, purchase options are completely ineffective unless the Commission first takes a number of steps to amend its eligibility requirements through further rulemaking. EBS entities best understand how to utilize their spectrum resources to meet their own unique and vital education missions and should be permitted to anticipate the potential for such events and to construct contingencies into their lease agreements to dispose of their spectrum in whatever manner they see fit. IMWED's proposal would restrict EBS licensees from exercising control over their spectrum and, thus, is entirely incompatible with the flexible, market-oriented goals of the BRS/EBS rule rewrite.<sup>17</sup> Moreover, IMWED's approach would deny Clarendon and other similarly situated EBS licensees the benefit of additional compensation they receive in exchange for providing the purchase option, compensation which goes to advance educational objectives.

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<sup>16</sup> *Supplement* at 4.

<sup>17</sup> Both the secondary markets and BRS/EBS rule overhaul proceedings rely largely upon market forces to dictate spectrum usage, which includes the facilitation of open-ended private transactions among private parties. See *Sprint Opposition* at 3-4.

IMWED's contention that the Clarendon Lease term is "infinite" and its implication that it is equivalent to the sale of an EBS system and, thus, inconsistent with the Commission's EBS eligibility requirements is misguided.<sup>18</sup> The Clarendon Lease term is essentially composed of an initial five-year term and successive terms of five and/or one years, which cannot extend beyond the time permitted under the Commission's rules.<sup>19</sup> Thus, if the license is canceled by the Commission or the relevant leasing rules are amended at some future date to prohibit such leasing arrangements, the lease will be subject to such changes. The Clarendon Lease construct, thus, tracks the Commission's *de facto* leasing rules, which state that long-term *de facto* transfer leasing arrangements may have "an individual term, or series of combined terms, of more than one year"<sup>20</sup> and that "a licensee and spectrum lessee that have entered into an arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement into the term of the renewed license authorization."<sup>21</sup> Moreover, Clarendon retains *de jure* control over the lease spectrum, as required by the secondary markets rules, which is not a "sale" under any legal construct that Sprint/Clarendon understand.<sup>22</sup>

IMWED fails to provide justification or explanation as to why the 15-year term limit it advocates is consistent with the spectrum management goals derived from the Commission's secondary markets leasing policies or the underlying goals of the BRS/EBS rule overhaul.<sup>23</sup>

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<sup>18</sup> See *Supplement* at 3 and 4.

<sup>19</sup> See Clarendon Lease at Sections 2 and 13(B).

<sup>20</sup> 47 C.F.R. § 1.9030(a).

<sup>21</sup> *Id.* at § 1.9030(l).

<sup>22</sup> See, e.g., Clarendon Lease at Section 10(A).

<sup>23</sup> The 15-year term limit was adopted as an increase to the prior 10-year limit to provide greater regulatory certainty and access to capital for commercial operators and to "provide greater certainty to

Moreover, IMWED is wrong in suggesting that there is an inconsistency between the Commission's decision to apply its secondary markets rules and policies to EBS leasing and its decision to retain the EBS eligibility requirements. In fact, the Commission rejected precisely that notion in the *BRS R&O*, concluding:

[W]e reject the view that the Commission's public interest goal of moving spectrum to its highest-valued use conflicts with the goal of promoting education. We believe that our actions today will instead promote both goals because the restrictions on eligibility here will not impede market forces. That is, our ITFS leasing and secondary market rules for spectrum leasing arrangements are sufficiently flexible to allow market forces to push the ITFS spectrum towards its highest valued use, and educators will continue to enjoy considerable flexibility to lease their excess capacity spectrum. Further, educators can enter into partnerships with commercial interests to improve the capacity and efficiency of their systems, which in turn could free up more spectrum for commercial operators to work towards the development of ubiquitous broadband.<sup>24</sup>

Indeed, EBS entities can and do benefit from the extended lease arrangements with commercial operators by having a steady source of revenues that can be used to support other education-related projects. The Clarendon Lease – once again – is a prime example of precisely just that. Clarendon views its airtime leasing arrangements with commercial operators as a type of public-private partnership that allows it to provide direct benefits to its school receive sites and indirect benefits to the general public. Indeed, as Clarendon noted in its earlier comments, “Most licensees do not have the capability of constructing and operating an instructional

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ITFS licensees, which, for instance, may appreciate the assurance of long-term, stable maintenance and operational support offered by a longer lease term.” *See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112, 19183 (1998). Further, as Sprint explained in its initial reply comments, the Commission has never specified how the fifteen-year term was to be calculated or codified within the lease, or how renewal provisions might impact that calculation, and instead expressly left negotiation of such terms to the leasing parties. *See Reply Comments of Sprint*, WT Docket No. 03-66 (filed Oct. 23, 2003) at 22. In that respect, it should be noted, the old 15-year term limit is not much different in operation than the specific term provisions contained in the secondary market leasing rules to which EBS spectrum leases entered into hereforward are subject. *See* 47 C.F.R. §§ 1.9020(a) and (m), and 47 C.F.R. §§ 1.9030(a) and (l).

<sup>24</sup> *BRS R&O* at ¶ 160.

television or fixed wireless broadband system with their own resources.”<sup>25</sup> It is the operational policy of Clarendon, as an EBS licensee, to support long-term relationships as embodied in airtime leases with renewal provisions that will give the commercial operator sufficient security and predictability needed to invest capital and take the risks of constructing and operating wireless broadband access networks. It is the opinion of Clarendon that the resulting stability of such a legal relationship is necessary for the introduction of new services and capabilities, such as those offered by wireless broadband access and interactive multimedia services, to the public.

Finally, there is nothing about the Clarendon Lease to suggest that the Commission should require the filing of unredacted copies of EBS leases. IMWED contends that the full texts of lease agreements must be made public so that the Commission and the public can monitor “trends” in leasing practices.<sup>26</sup> The only “trend” exemplified by the Clarendon Lease, however, is the trend that BRS and EBS licensees and operators are adhering to the new BRS/EBS service rules and policies adopted by the Commission, and that market forces are moving licensees and operators alike to utilize BRS/EBS spectrum more efficiently.<sup>27</sup>

The Commission has concluded that the streamlined filing mechanics for secondary markets leasing “minimize the burden on lease applicants while ensuring that we receive the information we need to complete our review of the proposed arrangement and to enforce our interference and other requirements as applicable to the lessee and the licensee.”<sup>28</sup> Requiring the

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<sup>25</sup> Comments of the Clarendon Foundation, WT Docket No. 03-66 (filed on Oct. 23, 2003) at 4.

<sup>26</sup> *Supplement* at 4.

<sup>27</sup> In any event, the secondary markets leasing provisions already include mechanisms for the Commission to review leases. See 47 C.F.R. §§ 1.9020(b)(3) and (c)(5); 47 C.F.R. §§ 1.9030(b)(3) and (c)(5).

<sup>28</sup> *Secondary Markets R&O* at 20669 ¶ 153 (as the Commission noted, “[w]hile we will not routinely require the lease applicants to submit a copy of the lease agreement with the application, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them

filing of EBS leases in unredacted form or otherwise making such agreements available for public inspection, as IMWED proposes, merely reinserts inefficiencies, transaction costs and administrative burdens. Indeed, IMWED's attempts to mandate disclosure of lease terms have been universally opposed by EBS and BRS entities alike.<sup>29</sup> As explained above, the aspects of the Clarendon lease raised by IMWED are compliant with the Commission's rules and, thus, suggests neither controversy regarding the Commission's recent leasing decisions nor that the Commission's ability to monitor leasing activity through the secondary markets rules was unsound. If anything, the Clarendon Lease's confirmation that EBS and BRS entities are embracing the new BRS/EBS rules suggests to Sprint/Clarendon that the Commission's decision not to mandate public disclosure of EBS leases was correct.<sup>30</sup>

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available for inspection by the Commission or its representatives." See also *id.* at 20660 ¶ 125; 47 C.F.R. §§ 1.9020(b)(3) and (c)(5); 47 C.F.R. §§ 1.9030(b)(3) and (c)(5).

<sup>29</sup> See, e.g., Comments of Catholic Television Network and National ITFS Ass'n, WT Docket No. 03-66, at 16 (filed Sept. 8, 2003); Consolidated Opposition to Petitions For Reconsideration of C&W Enterprises, Inc., WT Docket No. 03-66 (filed Feb. 22, 2005) at 3-4; Consolidated Opposition to Petitions For Reconsideration of Wireless Direct Broadcast System, WT Docket No. 03-66 (filed Feb. 22, 2005) at 3-4; Consolidated Opposition to Petitions For Reconsideration of Luxon Wireless Inc., WT Docket No. 03-66 (filed Feb. 22, 2005) at 6; Consolidated Opposition to Petitions For Reconsideration of SpeedNet, L.L.C., WT Docket No. 03-66 (filed Feb. 22, 2005) at 4; Consolidated Opposition to Petitions For Reconsideration of Direct Broadcast Corporation, WT Docket No. 03-66 (filed Feb. 22, 2005) at 2-3; Consolidated Opposition to Petitions For Reconsideration of the Wireless Communications Association International, Inc., WT Docket No. 03-66 (filed Feb. 22, 2005) at 35-37; Consolidated Opposition to Petitions For Reconsideration of Nextel Communications, WT Docket No. 03-66 (filed on Feb. 22, 2005) at 24-25; Consolidated Opposition to Petitions for Reconsideration of BellSouth Corporation, BellSouth Wireless Cable, Inc. and South Florida Television, Inc., WT Docket No. 03-66 (filed Feb. 22, 2005) at 13.

<sup>30</sup> The Commission's approach also recognizes that lease agreements may contain data that involves or implicates business plans or other competitively sensitive information that would not normally be disclosed to the public. As Sprint observed previously, in the *Secondary Markets R&O*, the Commission refrained from requiring additional information on actual spectrum usage and other lease information because such information "may involve data (e.g., areas of available spectrum) that could disclose a company's business plans or sensitive information to its competitors [and] collection of this information would impose costs on the Commission as well as licensees." See *Sprint Opposition* at n.13 (citing *Secondary Markets R&O* at 20766 ¶ 193.).

### III. IMWED'S PETITION FOR RELIEF IS PROCEDURALLY DEFICIENT AND WITHOUT MERIT

IMWED's *Petition for Relief* requests that the Commission retroactively require the filing of unredacted copies of all EBS leases executed during the period of January 11, 2005, to July 11, 2005, and that these leases be made available for public inspection.<sup>31</sup> The basis for IMWED's *Petition for Relief* is that "important public policy matters are at stake in the fine print of EBS excess capacity lease agreements" and that such print must be monitored for compliance and policy reasons.<sup>32</sup> IMWED's *Petition for Relief* is factually wrong, misrepresents the Clarendon Lease, and fails to provide justification for the relief requested.

As a starting point, IMWED misrepresents the Clarendon Lease in an apparent attempt to create a controversy that does not exist. IMWED's allegation that Sprint and Clarendon "seek to evade important aspects of the substantive use requirements" reflects IMWED's desperation in that regard.<sup>33</sup> The relevant substantive use requirements are set forth in Section 27.1214 of the Commission's rules.<sup>34</sup> That section sets out certain minimum educational usage requirements, EBS licensee equipment purchase option requirements, and allows grandfathering of leases entered into under the old Part 74 rules. Otherwise, leases must adhere to the secondary markets leasing rules set forth in Part 1 of the Commission's rules. This is well-known to IMWED, since it objected to that decision in its opposition to petitions for reconsideration of the *BRS R&O*.<sup>35</sup>

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<sup>31</sup> See *Petition for Relief* at 7.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> 47 C.F.R. § 27.1214.

<sup>35</sup> See Consolidated Reply to Oppositions to Petitions for Reconsideration of The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, WT Docket No. 03-66 (filed on March 9, 2005) at 6 ("In the EBS/BRS Report and Order, the Commission subjected EBS and BRS leasing to the framework of the Secondary Markets rules and policies . . .").

IMWED's allegations that the Clarendon Lease evades or conflicts with the Commission's substantive use requirements are erroneous. As with its *Supplement*, IMWED in its *Petition for Relief* contends that Clarendon Lease is "perpetual" and asserts that this "conflicts" with the Commission's substantial use policy.<sup>36</sup> As indicated above, the Clarendon Lease term tracks the language of the governing secondary markets leasing rules.<sup>37</sup> There is no controversy there. IMWED also alleges that the Clarendon Lease conflicts with the Commission's substantial use policy by "allow[ing] Clarendon to purchase transmission equipment only if the lease is terminated as a result of action by Sprint."<sup>38</sup> The relevant FCC requirement states: "All spectrum leasing arrangements involving EBS spectrum must afford the EBS licensee an opportunity to purchase or to lease EBS equipment in the event that the spectrum leasing arrangement is terminated as a result of action by the spectrum lessee."<sup>39</sup> Again, there is no controversy. IMWED next points to the inclusion of a purchase option in the Clarendon Lease, which as explained above, is a non-issue.<sup>40</sup> Given that IMWED knows or should know the Commission's rules on each of these issues, and that the Clarendon Lease is in fact compliant with the Commission's rules in all respects, its allegations are an empty attempt to fabricate controversy where none exists.

Moreover, the *Petition for Relief* should be rejected on procedural grounds. In filing its *Petition for Relief*, IMWED is attempting to employ a regulatory mechanism used almost

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<sup>36</sup> *Petition for Relief* at 3.

<sup>37</sup> See 47 C.F.R. §§ 1.9030(a) and (l).

<sup>38</sup> *Petition for Relief* at 3.

<sup>39</sup> 47 C.F.R. § 27.1214(c).

<sup>40</sup> IMWED also attempts to make much ado about Sprint's policy positions on the desirability of publicly filing unredacted EBS releases. Sprint's position on this matter is well-grounded in public policy, reflects



exclusively for adjudicatory and licensing matters that impact the rights and duties of a specific entity or individual to retroactively alter lawfully adopted rules of general applicability.

Assuming, *arguendo*, that IMWED's *Petition for Relief* was even appropriate, it fails to show that it or any other entity or individual has been or will be harmed in the absence of its requested relief, nor does it present any compelling facts or circumstances that would justify the rule alterations it seeks. Rather, IMWED indicates that the rule changes are needed to "verify[] lease compliance with FCC substantive use requirements, or assess[] how their provisions bear upon issues pending before the Commission on reconsideration."<sup>41</sup> As explained above, the Commission has already decided that its secondary markets rules provide it with adequate means to monitor compliance, and the fact that leases contain provisions that are in compliance with the Commission rules has no bearing on the sufficiency of those rules.<sup>42</sup>

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the Commission's own views on this subject and, as noted above, is solidly supported by the record. See *infra* note 30.

<sup>41</sup> *Petition for Relief* at 6.

<sup>42</sup> In as much as IMWED is seeking a stay of certain portions of the Commission's new leasing provisions, it similarly fails to meet its burden under the standard for granting such requests. Such movants are required to show that: (i) its *Reconsideration Petition* is likely to prevail on the merits; (ii) it will suffer irreparable harm, absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest would favor a grant of the stay. See *Motions for Stay of Auction No. 57 and Requests for Dismissal or Disqualification*, Order, 19 FCC Rcd 20482, 20487 (2004) (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977)). As indicated, IMWED has not made any representations that it or any other entity has or could be harmed by the rules it seeks to alter. Further, the public interest in applying the secondary markets leasing rules – including the elimination of any requirement to publicly file unredacted copies of the leases themselves – already has been established, and IMWED has not presented even a shred of evidence that the Commission's decision in that regard was incorrect.

#### IV. CONCLUSION

For the foregoing reasons, Sprint and Clarendon respectfully request that the Commission reject IMWED's *Supplement* and *Petition for Relief*.

Respectfully submitted,

#### CLARENDON FOUNDATION

/s/ Kemp R. Harshman

Kemp R. Harshman  
President  
Clarendon Foundation  
4201 31st Street South  
Suite 826  
Arlington, VA 22206  
703-598-7265

#### SPRINT CORPORATION

/s/ David Munson

Luisa L. Lancetti  
Vice President, Wireless Regulatory Affairs  
David Munson  
Attorney  
  
Sprint Corporation  
401 9<sup>th</sup> Street, N.W., Suite 400  
Washington, D.C. 20004  
202-585-1923

August 2, 2005

## **CERTIFICATE OF SERVICE**

I hereby certify that, on this 2nd day of August, 2005, copies of this ***CONSOLIDATED OPPOSITION TO SUPPLEMENT TO PETITION FOR RECONSIDERATION AND PETITION FOR EXTRAORDINARY RELIEF*** in WT Docket Nos. 03-66, 03-67, 02-68, 00-230 and MM Docket No. 97-217 were sent by e-mail or First Class Mail, postage prepaid, to the parties listed below.

/s/ Jo-Ann G. Monroe

Jo-Ann G. Monroe

Fred Campbell  
Office of Chairman Martin  
Federal Communications Commission  
445 12th Street, S.W., 8th Floor  
Washington, D.C. 20554

John Branscome  
Office of Commissioner Abernathy  
Federal Communications Commission  
445 12th Street, S.W., 8th Floor  
Washington, DC 20554

Paul Margie  
Office of Commissioner Copps  
Federal Communications Commission  
445 12th Street, S.W., 8th Floor  
Washington, D.C. 20554

Barry Ohlson  
Office of Commissioner Adelstein  
Federal Communications Commission  
445 12th Street, S.W., 8th Floor  
Washington, D.C. 20554

Catherine Seidel  
Office of the Bureau Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Uzoma Onyeije  
Office of the Bureau Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Gregory Vadas  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

John Schauble  
Broadband Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Nancy Zaczek  
Broadband Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 3-C124  
Washington, DC 20554

Stephen Zak  
Broadband Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 3-C124  
Washington, DC 20554

Genevieve Ross  
Broadband Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 3-C124  
Washington, DC 20554

Erik Salovarra  
Auctions and Spectrum Access Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 4-A760  
Washington, DC 20554

John B. Schwartz  
John Primeau  
The ITFS/2.5 GHz Mobile Wireless  
Engineering & Development Alliance, Inc.  
P.O. Box 6060  
Boulder, CO 80306

Robert S. Foosaner  
Lawrence R. Krevor  
Trey Hanbury  
Nextel Communications Inc.  
2001 Edmund Halley Drive  
Reston, VA 20191

R. Gerard Salemm  
Nadja Sodos-Wallace  
Clearwire Corporation  
2000 Pennsylvania Avenue, Suite 4000  
Washington, DC 20006

Edwin N. Lavergne  
Fish & Richardson P.C.  
1425 K Street, N.W. Suite 1100  
Washington, DC 20005

Paul J. Sinderbrand  
Robert D. Primosch  
Nguyen T. Vu  
Wilkinson Barker Knauer, LLP  
2300 N Street, NW  
Suite 700  
Washington, DC 20037

William Huber  
Auctions and Spectrum Access Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 4-A760  
Washington, DC 20554

Best Copy and Printing, Inc.  
Portals II  
445 12th Street, SW  
Courtyard Level  
Washington, DC 20554

Dr. Michael R. Kelley  
The George Mason University Instructional  
Foundation, Inc.  
Mail Stop 1D2  
George Mason University  
Fairfax, VA 22030-4444

James G. Harralson  
Charles P. Featherstun  
BellSouth Corporation  
1155 Peachtree Street, N.E. Suite 1800  
Atlanta, GA 30309-3610

Cheryl A. Tritt  
Phoung N. Pham  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue, NW Suite 5500  
Washington, DC 20006

Todd Gray  
Dow Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue, Suite 800  
Washington, DC 20036

Bruce D. Jacobs  
Tony Lin  
Jarrett Taubman  
Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1128

Rudolph J. Geist  
Evan D. Carb  
RJGLaw LLC  
1010 Wayne Avenue Suite 950  
Silver Spring, MD 20910

Stephen E Coran  
Rini Coran, PC  
1501 M Street, NW Suite 1150  
Washington, DC 20005

John Ogren  
SpeedNet, L.L.C.  
843 Stag Ridge Road  
Rochester, MI 48309

Wireless Direct Broadcast System  
c/o Suzanne S. Goodwyn  
1661 Hunting Creek Drive  
Alexandria, VA 22314

David L. Mania  
Cheboygan Otsego Presque Isle Educational  
Service District/PACE Telecommunications  
6065 Learning Lane  
Indian River, MI 49749

Donald J. Evans  
Paul J. Feldman  
Lee G. Petro  
Fletcher Heald & Hildreth  
1300 North 17<sup>th</sup> Street 11<sup>th</sup> Floor  
Arlington, VA 22209

Davida M. Grant  
James K. Smith  
Paul K. Mancini  
SBC Communications, Inc.  
1401 Eye Street, N.W.  
Washington, DC 20005

Laura C. Mow  
Jennifer A. Lewis  
Gardner Carton & Douglas, LLP  
1301 K Street, N.W. Suite 900, East Tower  
Washington, DC 20005

Donald L. Herman, Jr.  
Rebecca L. Murphy  
Bennet & Bennet, PLLC  
10 G Street, N.E. 7th Floor  
Washington, DC 20002

Joseph A. Belisle  
Leibowitz & Associates PA  
One SE 3rd Ave Ste 1450  
Miami, FL 33131

Howard J. Barr  
Womble Carlyle Sandridge & Rice, PLLC  
1401 Eye Street, N.W. Seventh Floor  
Washington, DC 20005

John de Celis  
Grand Wireless Company  
122 Ocean Road  
Ocean City, NJ 08226

Digital Broadcast Corporation  
c/o Suzanne S. Goodwyn  
1661 Hunting Creek Drive  
Alexandria, VA 22314

L. Marie Guillory  
Jill Canfield  
National Telecommunications Cooperative Assoc.  
4121 Wilson Boulevard, 10<sup>th</sup> Floor  
Arlington, VA 22203

Theodore D. Frank  
Peter J. Schildkraut  
Donald T. Stepka  
William C. Beckwith  
Arnold & Porter, LLP  
555 12<sup>th</sup> Street, N.W.  
Washington, DC 20004

Richard D. Rubino  
Robert M. Jackson  
Blooston, Mordkofsky, Dickens, Duffy & Prendergast  
2120 L Street, N.W. Suite 300  
Washington, DC 20037

Thomas Knippen  
W.A.T.C.H. TV Company  
3225 West Elm Street  
Lima, OH 45805-2518

Brian W. Gortney, II  
Luxon Wireless Inc.  
P.O. Box 1465  
Fort Walton Beach, FL 32549

John W. Jones Jr.  
C&W Enterprises, Inc.  
P.O. Box 5248  
San Angelo, TX 76902

Douglas J. Minster  
Atlantic Tele-Network Inc.  
9719 Estate Thomas  
St. Thomas, VI 00802